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**Taking forward multilateral nuclear disarmament negotiations: concrete effective legal measures, legal provisions and norms that will need to be concluded to attain and maintain a world without nuclear weapons**

# The "legal gap", the Treaty on the Non-Proliferation of Nuclear Weapons and different approaches on taking forward nuclear disarmament negotiations

## Submitted by Austria

1. The "Humanitarian Pledge" that was presented at the Vienna Conference at the Humanitarian Impact of Nuclear Weapons (8–9 December 2014 www.hinwvienna14.at), inter alia calls"(...) on all States parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) to renew their commitment to the urgent and full implementation of existing obligations under Article VI, and to this end, to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons(emphasis added)". Since its presentation, the issue of the "legal gap" has been the subject of some intense discussions, in particular during the 2015 NPT Review Conference and the First Committee of the 70th General Assembly of the United Nations.

2. More than 120 States have formally endorsed the "Humanitarian Pledge" and 139 States voted in favour of resolution 70/48 entitled "The Humanitarian Pledge for the Prohibition and Elimination of Nuclear Weapons" at the 70th session of the General Assembly of the United Nations. A large number of States has, thus, expressed a shared general understanding with the notion that such a "legal gap" exists and that the full implementation of the NPT Article VI obligation requires that this gap be filled through identifying and pursuing effective measures. Other States, however, have opposed this notion and contested the existence of a "legal gap" with respect to the NPT itself and nuclear disarmament in general. This working paper examines the "legal gap", its relationship with the NPT and the different approaches on how to take forward multilateral nuclear disarmament negotiations.

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3. Compared to the nuclear disarmament obligation of Article VI, the NPT non-proliferation provisions have been operationalised in some detail. The basic non-proliferation obligations for nuclear weapon and non-nuclear weapon States are laid out in Articles 1 and 2 in terms of general prohibitions (prohibition of transfer, receipt, induction, assistance, manufacture and acquisition of nuclear weapons or other explosive nuclear devices). Article 3 stipulates the obligation of non-nuclear weapon States to conclude safeguards agreement with the International Atomic Energy Organization (IAEA). The negotiations of the specifics of these agreements was "outsourced" by the NPT to the IAEA in which context a comprehensive and multi-layered safeguards system has been developed over the past decades. Other treaties to complement the NPT non-proliferation and disarmament provisions are the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and a possible future fissile material cut-off treaty (FMCT). Nuclear weapon free zone treaties also concretize and complement the NPT goals. Moreover, the non-proliferation provisions of the NPT have been the inspiration for inter alia in Security Council resolution 1540, international export control arrangements (Nuclear Suppliers Group (NSG), Missile Technology Control Regime (MTCR)) and translated into national legislations. Additional ad hoc arrangements of limited membership have been established to further strengthen the NPT-based non-proliferation provisions, such as inter alia the Proliferation Security Initiative (PSI), the Global Initiative (GI) or the Nuclear Security Process.

4. There is thus general agreement that additional and more specific legally binding provisions and other normative arrangements are required to operationalise and complement the NPT non-proliferation provisions. Such treaties and arrangements can be universal, regional or ad hoc groupings with more limited participation. The legal gap(s) that the NPT left open on its non-proliferation pillar were filled over time – and continue to be filled - with a multitude of different effective legal and non-legal measures. The intended combined effect of these effective measures is to strengthen the global non-proliferation norm and form the framework for the fulfilment of the NPT the obligations and commitments of member States.

5. The obligation under Article VI is the only legally binding multilateral nuclear disarmament provision and hence the general basis for multilateral nuclear disarmament efforts. However, it does not provide specific guidance what kind of negotiations should be pursued in good faith nor what the effective measures relating to the cessation of the nuclear arms race should be. Even more so than with the NPT non-proliferation obligations, the NPT therefore leaves a – or several – gap(s) with respect to the specific legal and non-legal measures that are required for the fulfilment of Article VI.

6. Building upon the Article VI obligation, a variety of effective measures, such as those specified in Final Documents of past NPT Review Conferences, in particular 1995, 2000 and 2010, were identified as being required to achieve and maintain a world without nuclear weapons. They include non-legal measures such as the reduction and elimination of nuclear weapons, the reduction of the roles of nuclear weapons in security doctrines, confidence building and transparency and various risk reduction measures. The prohibition of nuclear testing (CTBT) or pursuing a prohibition of the production of fissile materials for nuclear weapons (FMCT) are broadly recognised effective legal measures to fill specific or partial legal gaps for the implementation of the NPT nuclear disarmament (and non-proliferation) obligations. Other legal measures such as the prohibition of the use, production stockpiling and transfer of nuclear weapons have not yet been considered in detail in the NPT context. However, it is clear that such measures are required for achieving and maintaining a world without nuclear weapons. Verification arrangements – legally binding as well as not legally binding – will also be a key element, especially to maintain a nuclear weapon free world.

7. The very structure of the NPT requires additional legal (and non-legal) measures for its full implementation. This applies to Article VI just as much as it applies to the non-proliferation obligations. All the elements listed above therefore represent different legal and non-legal gaps that will have to be "filled" for the full implementation of existing obligations under Article VI and for the achievement and maintenance of a world without nuclear weapons. Similar to implementing the non-proliferation obligations of the NPT, the different nuclear disarmament measures can and should be pursued in parallel as best as possible and feasible. The combined effect of all different legal and non-legal measures will amount to the full implementation of Article VI and provide the multilateral framework for the achievement and maintenance of a world without nuclear weapons.

8. The existence of a "legal gap for the prohibition and elimination of nuclear weapons" is therefore evident. Moreover, it should also be recognized that the obligation under Article VI that is applicable to all State parties requires efforts to pursue and identify effective legal (and other) measures. Action 1 of the 2010 Action Plan underlines this by declaring that "All States parties commit to pursue policies that are fully compatible with the Treaty and the objective of achieving a world without nuclear weapons.

9. Several different approaches have been discussed on how to take forward multilateral nuclear disarmament forward. The "New Agenda Coalition", for example, examined the different effective legal measures, namely the so-called "step-by-step", "building blocks", "comprehensive nuclear weapons convention", "prohibition/ban treaty" or "framework convention" approaches in working papers, most recently at the 2015 NPT Review Conference (NPT/CONF.2015/WP.9). All of these approaches are aimed at implementing Article VI and how a world without nuclear weapons should be achieved. Consequently, they also represent different avenues for the prohibition and elimination of nuclear weapons.

10. These approaches are frequently juxtaposed, in particular, the "step-by-step" approach with a "comprehensive nuclear weapons convention" or a "prohibition/ban-treaty". Some of these different viewpoints, however, appear to be based on false dichotomies and may be misleading. Cleary and as mentioned above, achieving and maintaining a world without nuclear weapons requires a multitude of legal and non-legal measures. The "step-by-step" approach by definition recognizes that multiple measures are needed and essentially refers to a combination and sequence of different legal and non-legal measures. Conceptually, these different measures would include both, a "nuclear weapons convention" and/or a "prohibition/ban treaty". A "comprehensive nuclear weapons convention" foresees the legally binding codification of all effective legal measures required to achieve, but primarily, to maintain a world without nuclear weapons. A prohibition/ban-treaty, would likely entail the prohibition of use, stockpiling, production and transfer of nuclear weapons, without necessarily addressing all effective legal measures covered by a nuclear weapons convention. It could also be considered as one (legal) in a "step-by-step" approach as well as a sub-set of a "comprehensive nuclear weapons convention" that would cover legally binding prohibitions but maybe not all other elements, such as for example verification measures. Consequently, these approaches should not be considered as in competition with one another or mutually exclusive but as complementary. All approaches have much in common as they aim at reinforcing the implementation of Article VI and taking forward nuclear disarmament negotiations.

11. The divergences of views that continue to persist may therefore relate less to the different legal approaches to nuclear disarmament and more to the underlying motivation and the sense of urgency with which nuclear disarmament is pursued and, following from this, what priority should be given to which effective legal and non-legal measures. When States with nuclear weapons and States in nuclear alliances argue in favour of a "step-by-step" approach, they tended to refer to an approach they see as compatible with maintaining

nuclear weapons based security system, for as long as this is deemed necessary. In practice, this has meant support only for gradual steps, both legal and non-legal, where nuclear deterrence doctrines can be maintained essentially unchanged until a – as yet unspecified – "final stage" when nuclear disarmament is achieved. It thus appears that the identification and pursuing of "effective legal measures for the prohibition and elimination of nuclear weapons" is not a priority issue and supported by those States precisely because it is considered incompatible with the – perceived – need of maintaining a nuclear weapons based security system, at least for the time being.

12. The focus of the humanitarian initiative on the impact of and the risks associated with nuclear weapons has provided a set of arguments for urgent progress on nuclear disarmament and for moving away from nuclear weapons based security system. The "Humanitarian Pledge" builds upon these arguments and draws conclusions that should be drawn from the new evidence and formulates a different set of priorities. It stipulates that humanitarian concerns "should be at the centre of all deliberations, obligations and commitments with regard to nuclear disarmament". It underscores the importance of the "protection of civilians against risks stemming from nuclear weapons" and lists a number of "interim measures to reduce the risk of nuclear weapon detonations". Finally, it highlights the urgent need to "identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons" (...) in light of the unacceptable humanitarian consequences and risks associated with nuclear weapons.

13. Different perspectives on the motivation and the priorities appear to be at the centre of the differences of opinion of how to take forward multilateral nuclear disarmament negotiations and how to address the "legal gap for the prohibition and elimination of nuclear weapons": The step-by-step approach says that only such nuclear disarmament measures can be taken that allow, at the same time, for the maintenance of a nuclear weapons based security system. The humanitarian initiative states that in light of the unacceptable humanitarian consequences and risks associated with nuclear weapons all possible effective measures – legal and non-legal – need to be taken in order to move away from nuclear weapons based security system with urgency.

## Conclusion

14. It should be possible to set aside the divergences of views regarding the existence of a "legal gap" as well as regarding the complementarity with the NPT of all efforts to fill or address this and other gaps on disarmament and non-proliferation alike. A discussion on the approaches on how to take forward multilateral nuclear disarmament negotiations forward the different approaches is overdue. However, these approaches may be more complementary than is often assumed. At the core of the substantive differences in the debate on the "legal gap" is the underlying motivation of different stakeholders for nuclear disarmament and which priority is therefore given to different effective legal and non-legal measures.